88-499

No.

Supreme Court, U.S.
FILED
SEP 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

PETER F. SHIELDS,
Petitioner,

vs.

PRODUCTION FINISHING CORPORATION,
Respondent,

and

FLAT ROCK METAL, INC.,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTION PRESENTED

WHETHER A STATE VIOLATES DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY APPLYING AN IRREBUTTABLE PRESUMPTION THAT A FORMER EMPLOYEE WHO FAILS TO INFORM HIS FORMER EMPLOYER OF A BUSINESS OPPORTUNITY PRIOR TO TAKING ADVANTAGE OF THAT OPPORTUNITY CAN BE HELD LIABLE EVEN WHEN A JURY HAS DETERMINED THAT NO CORPORATE OPPORTUNITY EXISTED AS A MATTER OF ACTUAL FACT?

LIST OF THE PARTIES

The parties appearing in the litigation before the Michican Court of Appeals included Peter F. Shields and Flat Rock Metal, Inc., Co-Defendants, and Production Finishing Corporation, Plaintiff. Co-Defendant, Flat Rock Metal, Inc., has not filed a Petition for Writ of Certiorari.

TABLE OF CONTENTS

QUESTION PRESENTED I
LIST OF THE PARTIES II
INDEX TO APPENDIX V
INDEX TO AUTHORITIES VI
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT OF THE CASE 2

1. Overview 2
2. Mr. Shields' and Production Finishing Corporation's previous unsuccessful efforts to obtain Ford's business 4
3. Ford Motor Company's absolute refusal to deal with Production Finishing Corporation 5
4. Mr. Shield's resignation from Production Finishing Corporation and acquisition of the Ford business 6

PRESERVATION OF THE ISSUES BELOW 7
THE FINALITY OF THE JUDGMENT 8
REASONS FOR GRANTING THE WRIT 9

1. This case affords the Court its first chance to review whether the corporate opportunity doctrine, when applied as an irrebuttable presumption, offends due process 9
2. The irrebuttable presumption that the Michigan Court of Appeals imposed, arbitrarily deprives litigants of an individualized determination and a fair ability to defend themselves from an assumed fact 12

3. The irrebuttable presumption that the Court of Appeals imposed violates due process because it destroys the allocation of burden of proof and risk of error in civil cases 23

INDEX TO APPENDIX

A. Order Denying Rehearing, Supreme Court of Michigan, dated June 28, 1988 ..... A1

B. Order Denying Application for Leave to Appeal, Supreme Court of Michigan, dated March 22, 1988 ..... A3

C. Order Denying Rehearing, Michigan Court of Appeals, dated June 3, 1987 ..... A5

D. Opinion of the Michigan Court of Appeals, dated March 16, 1987 ..... A7

E. Order Denying Plaintiff's Motion for N.O.V. or in the Alternative for New Trial, Wayne County Circuit Court, dated September 20, 1984 ..... A23

F. Order Granting Judgment of No Cause for Action, Wayne County Circuit Court, dated June 19, 1984 ..... A25

G. Trial Transcript, including Jury Verdict, dated May 17, 1984 ..... A27

INDEX TO AUTHORITIES

Michigan Cases:

Production Finishing Corp. v. Shields, 158 Mich. App. 479, 405 N.W.2d 171 (1987) 1, 3, 6, 14, 23, 24

LA Young Spring & Wire Corp. v. Falls, 307 Mich. 69 (1943) 22, 23

Out-of-State Cases:

Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213 (Alaska 1965) 17

Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948) 19

Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976) 21

Guth v. Loft, 23 Del. 255, 5 A.2d 503 (1939) 16, 18, 19

Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900) 17-18

Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71 (1974) 19, 20, 21

Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933) 18

Southeast Consultants, Inc. v. McCrary Eng. Corp., 246 Ga. 503, 273 S.E.2d 112 (1980) 16, 17

Federal Cases:

Abbott Redmont Thinlite Corp. v. Redmont, 475 F.2d 85 (2nd Cir. 1973) 18

Addington v. Texas, 441 U.S. 418 (1979) 24, 25

Alabama Great Southern Railroad Co. v. Allied Chemical Corp., 501 F.2d 94 (5th Cir. 1974), *reh. denied*, 509 F.2d 539 (1974) 13

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 13
Bandini Petroleum Co. v. Superior Court, Los Angeles County, California, 284 U.S. 8 (1931) 13
Bell v. Burson, 402 U.S. 535 (1971) 14
Brady v. Maryland, 373 U.S. 83 n. 1 (1962) 8
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 12
Carrington v. Rash, 380 U.S. 89 (1965) 14
Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 14
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 8
Dep't of Banking v. Pink, 317 U.S. 264 (1942) 8
Fuentes v. Shevin, 407 U.S. 67 (1972) 10
Galvan v. Press, 347 U.S. 522 (1954) 12
Heiner v. Donnon, 285 U.S. 312 (1932) 13
Holden v. Hardy, 169 U.S. 366 (1898) 12
Lassiter v. Dep't of Social Serv. of Durham County, North Carolina, 452 U.S. 18 (1981) 12
Leary v. United States, 395 U.S. 6 (1969) 23
Lindsay v. Normet, 405 U.S. 56 (1972) 13
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 10
Matthews v. Eldridge, 424 U.S. 319 (1976) 24
Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed, 219 U.S. 35 (1985) 23
Nickey v. State of Mississippi, 292 U.S. 393 (1934) 13
North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973) 8
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 10
Radio Station WOW v. Johnson, 326 U.S. 120 (1944) 8
Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946) 8
Santosky v. Kramer, 455 U.S. 745 (1982) 25, 26

Slochower v. Bd. of Higher Educ. of New York City, 350 U.S. 551 (1956) 12
Sniadach v. Family Finance Corp., 395 U.S. 377 (1969) 10, 12
Stanley v. Illinois, 405 U.S. 645 (1972) 14
United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) 14
Vlandis v. Kline, 412 U.S. 441 (1973) 14, 15, 21, 22, 24
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 11
Weinberger v. Salfi, 422 U.S. 749 (1975) 13, 15, 16
Western & Atlantic Railroad Co. v. Henderson, 279 U.S. 639 (1929) 13

Statutes:

28 U.S.C. § 1257 ..... 8, 9
28 U.S.C. § 1257(3) 1

Constitutions:

Fourteenth Amendment, United States Constitution 2

Miscellaneous:

Ballantine *On Corporations*, 204 (1946) 19
E. Brodsky & M. Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities*, § 4.01, p. 2 (1984) 17
Vrudney & Clark, *A New Look at Corporate Opportunities*, 94 Harv. L. Rev. 997 (1981) 23

To the Honorable William H. Rehnquist, Chief Justice of the United States and to the Honorable Associates Justice of the United States Supreme Court:

Petitioner, Peter F. Shields, respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the Michigan Supreme Court in Orders Dated March 22, 1988 and June 28, 1988 and the Michigan Court of Appeals entered on March 16, 1987.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 158 Mich. App. 479, 405 N.W.2d 171 (1987), *lv denied,* 430 Mich. 859 (1988) and is also found in the appendix.

JURISDICTION

The Opinion of the Michigan Court of Appeals sought to be reviewed was entered on March 16, 1987. A Motion for Rehearing was duly and timely filed on April 3, 1987. The Michigan Court of Appeals entered an Order denying the Motion for Rehearing on June 3, 1987. On June 24, 1987, an Application for Leave to Appeal to the Michigan Supreme Court was timely filed by Petitioner. On March 22, 1988, the Court denied the Application for Leave to Appeal. A Motion for Rehearing was duly and timely filed on April 12, 1988. On June 28, 1988, the Michigan Supreme Court denied the Motion for Reconsideration. The jurisdiction of the court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Overview.

This action involves a dispute between Production Finishing Corporation and Peter F. Shields. Production Finishing Corporation alleged and sought to prove at trial that Peter F. Shields wrongfully appropriated corporate opportunities belonging to Production Finishing. Specifically, Production Finishing asserted that Ford Motor Company's Monroe Facility's steel polishing business and the sale of its polishing equipment were corporate opportunities wrongfully appropriated by Shields. Peter F. Shields contended, at trial and on appeal, that no corporate opportunities existed in favor of Production Finishing Corporation in these regards since Ford Motor Company was unwilling to deal with the corporation and that refusal to deal was unequivocal.

The case was tried from April 30, 1984, through May 17, 1984, before Wayne County Circuit Court Judge Charles Kaufman. On May 17, 1984, the jury rendered its verdict in response to special verdict questions that had been submitted by the court. The jury found (1) that the opportunity to perform Ford's polishing services was not a corporate opportunity of Production Finishing Corporation, (2) that the opportunity to purchase Ford's polishing equipment was not a corporate opportunity of Production Finishing Corporation, and (3) that Peter F. Shields did not breach his fiduciary duties to Production Finishing Corporation. Pursuant to the jury's answers to the special verdict questions, a judgment in favor of the Defendants was entered on June 19, 1984. On September 20, 1984, the trial court entered its Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

By Opinion dated March 16, 1987, the Michigan Court of Appeals made the factual determination that it was "unlikely that Production Finishing would have obtained the Ford work." *Production Finishing Corp. v. Shields,* 158 Mich. App. 479, 488, 405 N.W.2d 171 (1987). Nevertheless, the Court of Appeals reversed the jury verdict, found liability as a matter of law, and remanded the case for a trial as to damages only. The Court of Appeals based its decision on the ground that, as a fiduciary, Shields was barred from asserting that Ford refused to deal with Production Finishing since he purportedly failed to disclose this fact to Production Finishing.

2. Mr. Shields' and Production Finishing Corporation's previous unsuccessful efforts to obtain Ford's business.

Petitioner, Peter F. Shields, was hired as the president of Production Finishing Corporation, a steel polishing business, on January 1, 1974. (Tr., April 30, 1984, pp. 151-53). In April of 1981, Production Finishing was the only company in the Detroit area which provided polishing services for bumper steel independent of the automobile manufacturers themselves. (Tr., May 14, 1984, Vol. I-A, pp. 30-31). During the time Mr. Shields was president of Production Finishing, the business relationship between Production Finishing and Ford Motor Company was limited. (Tr., May 8, 1984, p. 10; Tr., April 30, 1984, p. 164).

Mr. Shields testified that throughout the time he was president of Production Finishing Corporation, Production Finishing was trying to get new business, including that of Ford Motor Company. (Tr., April 30, 1984, pp. 165-66, 176). Mr. Shields testified that he would personally contact the plant personnel at the Ford Motor Company in an effort to acquire additional Ford business on behalf of Production Finishing. (Tr., April 30, 1984, pp. 167, 184; Tr., May 8, 1984, p. 143). In fact, Production Finishing had unsuccessfully asked for the Ford business on so many occasions that Ford's Monroe plant manager, Stanley Cronenwett, told Production Finishing it should "get a rubber stamp" to use in making the repeated requests. (Tr., April 30, 1984, p. 184).

3. Ford Motor Company's absolute refusal to deal with Production Finishing Corporation.

In early 1981, when Ford decided to out-source the polishing services which it had done at the Monroe facility (Tr., May 8, 1984, p. 142), Mr. Shields tried to secure the Ford polishing business for Production Finishing. (Tr., May 1, 1984, p. 23). Despite Mr. Shield's attempts to secure the business on behalf of production Finishing Corporation, Ford Motor Company's plant manager, Mr. Cronenwett, Ford Motor Company's purchasing agent, Carl Granning Jr., and Mr. John Scicluna, director of facilities and tool purchasing at Ford, all testified that Ford Motor Company did not want to do business with Production Finishing. (Tr., May 9, 1984, pp. 33-34; Tr., May 8, 1984, pp. 4-5; Tr., May 15, 1984, pp. 36-39; Tr., May 9, 1984, pp. 41-42; Tr., May 8, 1984, pp. 81, 97; Tr., May 15, 1984, p. 65). Ford Motor Company officials refused to deal with Production Finishing Corporation because they viewed it as a monopoly in the relevant market. (Tr., May 15, 1984, p. 65; Tr., May 8, 1984, p. 81; Tr., May 9, 1984, pp. 41-43; Tr., May 8, 1984, pp. 78, 81, 97). Ford Motor Company's refusal to deal with Production Finishing was unequivocal. In fact, Mr. Scicluna emphasized that even if there had been no alternative source other than Production Finishing, Ford would simply have maintained the polishing equipment at Monroe rather than selling it to Production Finishing. (Tr., May 15, 1984, p. 68). "We were not going to sell it to Production Finishing in any event."

4. Mr. Shield's resignation from Production Finishing Corporation and acquisition of the Ford business.

Following Ford Motor Company's refusal to deal with Production Finishing, Mr. Shields did not do anything else to obtain Ford business for Production Finishing having concluded that the Ford business was not available to Production Finishing. (Tr., May 1, 1984, pp. 50, 52). Mr. Shields then submitted a proposal to Ford (Tr., May 2, 1984, pp. 58, 103-05), incorporated Flat Rock Metal, Inc., and secured a loan. (Tr., May 1, 1984, pp. 98-101). On August 20, 1981, Mr. Shields resigned from Production Finishing. (Tr., May 1, 1984, pp. 187-88). The closing at which Flat Rock Metal, Inc., acquired the Ford equipment and executed the contract to perform Ford's bumper steel polishing business took place on the afternoon of August 20, 1981. (Tr., May 1, 1984, p. 187).

Production Finishing brought an action against Peter Shields and Flat Rock Metal, Inc., resulting in a jury trial before Wayne County Circuit Court Judge Charles Kaufman. After a lengthy trial, the jury found that neither the opportunity to perform Ford's polishing services nor the opportunity to purchase Ford's polishing equipment was a corporate opportunity of Production Finishing. The Michigan Court of Appeals while recognizing that it was "unlikely that Production Finishing would have obtained the Ford work," nevertheless reversed the jury verdict and remanded the case for a trial as to damages only. *Production Finishing Corp. v. Shields*, 158 Mich. App. 479, 488, 405 N.W.2d 171 (1987).

PRESERVATION OF THE ISSUES BELOW

In his April 3, 1987 Motion for Rehearing which was filed in the Michigan Court of Appeals, Peter F. Shields asserted that the Court of Appeals' decision articulating a strict rule of non-disclosure liability impermissibly created an irrebuttable presumption. In his June 24, 1987 Application for Leave to Appeal to the Michigan Supreme Court, Peter F. Shields renewed the argument that the Michigan Court of Appeals had erroneously adopted a prophylactic rule which itself constituted an irrebuttable presumption. In his August 21, 1987 Reply Brief in Support of Application for Leave to Appeal, Peter F. Shields again argued that the prophylactic rule adopted by the Michigan Court of Appeals, eliminating all possible liability defenses, impermissibly created an irrebuttable presumption and that the Supreme Court of the United States had repeatedly struck irrebuttable presumptions as being violative of the due process clause of the United States Constitution. Most recently in his April 11, 1988 Motion for Reconsideration, Peter F. Shields restated his argument that the rule of strict liability for non-disclosure as stated by the Michigan Court of Appeals constitutes an impermissible irrebuttable presumption which operates to deprive him of due process of law. The constitutional issue which Peter F. Shields raises in the instant Petition for Writ of Certiorari was maintained and presented consistently in the appellate courts of the State of Michigan.

THE FINALITY OF THE JUDGMENT

The state judgment sought to be reviewed here is final within the meaning of 28 U.S.C. § 1257. The purpose of § 1257's finality requirement is three-fold: 1) to prevent piecemeal review of state court decisions, 2) to avoid advisory opinions which do not represent an actual case or controversy as required under Article III, and 3) to limit unnecessary intrusion into state affairs. *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156, 159 (1973). The test is whether "the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Dep't of Banking v. Pink,* 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 72 (1946).

The problem of what constitutes a final judgment has occasioned difficulty over the years. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1974), the court reviewed that history, concluding that there are several categories of cases in which the Supreme Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 despite further proceedings in the lower courts to come. 420 U.S. at 477. When the additional proceedings have little substance, are unrelated to the federal issue or when the federal issue would be moot if the Petitioner prevailed on the merits in the later state court proceedings, this Court has rightly concluded that the judgment is final within the meaning of 28 U.S.C. § 1257. 420 U.S. at 477-85. *See e.g., Radio Station WOW v. Johnson,* 326 U.S. 120, 124-27 (1944), *Brady v. Maryland,* 373 U.S. 83, 85, n. 1 (1962).

Although the Michigan Court of Appeals remanded this case for a trial on damages, the state court judgment has conclusively resolved the rights and duties of the parties. Any issues which might arise at the state court trial for damages are unrelated to the federal issue in question here. As a result, the state court judgment is final for purposes of 28 U.S.C. § 1257 and this Court has jurisdiction to review the judgment.

REASONS FOR GRANTING THE WRIT

1. This case affords the Court its first chance to review whether the corporate opportunity doctrine, when applied as an irrebuttable presumption, offends due process.

This case affords the Supreme Court of the United States an opportunity to determine whether the corporate opportunity doctrine, applied as an irrebuttable presumption, offends due process. Does the right to a meaningful trial as guaranteed under the due process clause mandate that the actual facts be considered before a defendant is called upon to pay damages? The Michigan rule imposes liability on the defendant notwithstanding a jury determination that no appropriation of a corporate opportunity has occurred because a third party has refused to deal with the corporation. Does a "prophylactic rule" mean that we can suspend the truth and vivify the lack of substance by permitting a claim based upon appearances only?

This Court has rightly afforded review in those cases in which state courts have enforced pre-judgment attachment, garnishment, or process, since allowing one private litigant to employ the power of the state to take the prop-

erty of another is an affront to the due process clause. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), *Sniadach v. Family Finance Corp.*, 395 U.S. 377 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972). In the case now before the court, the Michigan Court of Appeals has devised an equally repugnant rule for trial, one which permits a corporation to secure the taking of the defendant's property based upon an irrebuttable presumption which arbitrarily prevents a litigant from presenting relevant evidence in his behalf. The Michigan Supreme Court has declined further review.

Under the Michigan Court of Appeals' rule adopted in this case, a litigant charged with usurping a corporate opportunity is deprived of an opportunity for an individualized determination and a fair ability to defend himself from an assumed fact. Like *Sniadach*, property in the present case will be taken without demanding absolutely essential prior proof within the context of a fair hearing. Although in the present case the taking followed a trial, the analysis remains the same when the results of the jury's findings are replaced with a presumption that runs directly counter to those findings. Here, the clarion call for review is no less compelling than in the foregoing cases. At stake is the fundamental fairness of the civil legal system, which hinges upon a fair burden of proof balanced roughly equally between civil litigants.

Because of the ramifications of the Michigan Court of Appeals' rule, the case is one which presents federal constitutional issues of such national importance that they should be settled by the Court. The basic concept of the American legal system is that legal burdens should bear some relationship to individual responsibility or wrong-

doing. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). Petitioner suggests that the Michigan Court of Appeals' expansion of the corporate opportunity doctrine violates the constitutional rights of litigants by imposing an irrebuttable presumption that arbitrarily prevents a litigant from defending himself in a fair hearing.

The rule articulated by the Michigan Court of Appeals is that a corporation is irrebuttably presumed to have been deprived of any business opportunity of which the defendant later took advantage if full disclosure to the corporation was not made in advance. Regardless of whether the defendant's action caused any loss to the corporation, the defendant may be held liable. The Court's presumption renders totally irrelevant proof as to liability that the purported opportunity was, in fact, unavailable. In other words, even if the corporation was barred from pursuing the opportunity by state or federal anti-trust laws, by the corporate charter or by-laws, by financial inability or by, as here, a third-party's unwillingness to deal with the corporation, any employee or officer who took advantage of that "opportunity" is held fully responsible. This is true despite clear evidence that the corporation was unable to avail itself of the business opportunity at issue. Under the Michigan rule, the fact that a jury determined that the opportunity was unavailable to the corporation and that the reviewing court agreed that it was unlikely that the corporation could have availed itself of the opportunity makes no difference.

Petitioner respectfully submits that it is now time to resolve whether due process permits the award of money damages without a prior showing that a purported corporate opportunity was, in fact, available to the

corporation, and that the defendant wrongfully usurped that opportunity, thus injuring the Plaintiff. To postpone consideration of such nationally important issues not only compels corporate officers or employees who engage in any business venture to do so at their peril, but arbitrarily requires them to pay judgments when they have, in fact, neither injured the corporate plaintiff nor been unjustly enriched by their actions.

2. The irrebuttable presumption that the Michigan Court of Appeals imposed, arbitrarily deprives litigants of an individualized determination and a fair ability to defend themselves from an assumed fact.

The federal constitutional guarantee of due process extends to state action through judicial decisions as well as those taken by the executive or legislative departments of the state. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). In its purest form, "due process of law" implies a conformity with natural and inherent principles of justice which forbid the arbitrary taking of another's property. *Holden v. Hardy*, 169 U.S. 366 (1898). Certainly, traditional notions of due process of law have embodied the concepts of fair play, fundamental fairness, and a prohibition against arbitrary governmental actions. *Galvan v. Press*, 347 U.S. 522 (1954), *Slochower v. Bd. of Higher Educ. of New York City*, 350 U.S. 551 (1956), *Lassiter v. Dep't of Social Serv. of Durham County, North Carolina*, 452 U.S. 18 (1981). Any involuntary transfer of property must, in order to be sustained, afford the party prejudiced due process of law, the *sine qua non* for such a taking. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In

Heiner v. Donnon, 285 U.S. 312, 329 (1932), the court commented that:

> "The court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."

The guarantees of due process require that Petitioner be given an opportunity to present every available defense. *Lindsay v. Normet*, 405 U.S. 56, 67 (1972), *American Surety Co. v. Baldwin*, 287 U.S. 156, 158 (1932). *See also, Nickey v. State of Mississippi*, 292 U.S. 393, 396 (1934). Such an opportunity must be reasonably adequate to meet the task. Due process precludes a presumption which is entirely arbitrary, creates an invidious discrimination, or deprives Petitioner of a reasonable opportunity to present the pertinent facts in its defense. *Bandini Petroleum Co. v. Superior Court, Los Angeles County, California*, 284 U.S. 8, 19 (1931). When a state tort case involves a presumption which is rebuttable on the surface but which is, in practice, conclusive or permanent, the court has struck down its use as a violation of due process insofar as it deprives the defendant of an opportunity to be heard. *Western & Atlantic Railroad Co. v. Henderson*, 279 U.S. 639 (1929), *see also, Alabama Great Southern Railroad Co. v. Allied Chemical Corp.*, 501 F.2d 94, 99, 100 (5th Cir. 1974), *reh. denied*, 509 F.2d 539 (1974).

While it is certainly true that a presumption may not be a deprivation of due process if there is a meaningful and adequate opportunity to rebut or disprove the facts so presumed, *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), the courts considering the constitutional ques-

tion have had great difficulty when the presumption is permanent and irrebuttable, either by operation of law or *de facto*. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973), *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), *Stanley v. Illinois*, 405 U.S. 645 (1972), *United States Dep't of Agriculture v. Murry*, 413 U.S. 508 (1973), *Bell v. Burson*, 402 U.S. 535 (1971), *Carrington v. Rash*, 380 U.S. 89 (1965). The due process clause demands a more individualized determination; one that is not formed on rules which are "neither necessarily nor universally true." *LaFleur* at 645, 646.

The procedural effect of the Michigan Court of Appeals' ruling is to create an impermissible mandatory presumption. The substantive effect is a taking of the Petitioner's property without due process of law. The Court of Appeals held that the facts justified imposition of liability as a matter of law. In so doing, the court concluded that "Ford's polishing business, as well as the equipment was, at least initially, a business opportunity which Production Finishing had an interest in and was actively pursuing." 158 Mich. App. at 487. The court concluded that, based on these facts, the Plaintiff had established a *prima facie* case. Then, the court ruled that "a third party's purported refusal to deal with a corporation will not relieve a fiduciary from liability when he had failed to disclose the refusal to his principal." 158 Mich. App. at 489. The procedural effect of such a rule is to preclude a litigant from presenting facts in his liability defense. The Michigan Court of Appeals has adopted a rule of law which makes irrelevant for purposes of liability defenses any testimony as to whether there was, in fact, a corporate opportunity and creates an irrebuttable presumption that a cor-

porate opportunity existed when the facts all demonstrate to the contrary.[1]

In *Vlandis*, the court invalidated a statutory definition of "residence" to be used when determining the amount of tuition charged by the state's university system. The court held that the state could not purport to be concerned with residency, and then deny persons seeking to meet its test the opportunity to present relevant evidence. 412 U.S. at 452. The same reasoning obtains here. The Michigan Court of Appeals applied a doctrine purporting to consider whether a corporate opportunity was wrongfully appropriated. Despite this, the court's rule denied to Petitioner the opportunity to show factors, such as a third-party's refusal to deal, clearly bearing on the existence and appropriation of that opportunity.

The court's analysis in *Weinberger v. Salfi*, 422 U.S. 749 (1974) provides further support for Petitioner's view. The *Weinberger* court distinguished between cases permitting a test based on compliance with objective criteria where a party is permitted to present evidence that he meets the specified criteria and cases in which a criterion is set up but a litigant is denied the opportunity to present evidence that he meets the specified requirements. 422 U.S. 771-72. The former is constitutionally permissible. The latter denies due process. The present case resembles most closely those, such as in *Vlandis, supra*, in which a

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1. The Michigan Prophylactic Rule virtually strips Petitioner of any rights to avoid becoming liable to Respondent in the first place. This Petition should not be understood to have waived any of Petitioner's rights in any damages only retrial of claiming Ford Motor Company's absolute refusal to deal with Production Finishing mitigates against a finding that Respondent sustained any damages.

criterion is established but the litigant is denied the opportunity to present his case. The Court of Appeals' decision here purported to be concerned with the actual existence of a corporate opportunity and then denied the Defendant the opportunity to show factors clearly bearing upon the issue. A presumption with this result is impermissible.

It is particularly harmful when, as here, the right involved is a fundamental one, the right not to be deprived of property without due process of law. Unlike the noncontractual claim to receive funds from the public treasury involved in *Weinberger,* the right to be free from a deprivation of property without due process of law is a fundamental right and enjoys constitutionally protected status. The *Weinberger* court recognized that where, as here, protected rights are involved, irrebuttable presumptions are unconstitutional.

Corporate officers and directors are fiduciaries as to the corporation, and as such, are obligated not to appropriate corporate opportunities for personal gain. *Guth v. Loft,* 23 Del. 255, 5 A.2d 503 (1939). If a business opportunity is determined to be a corporate opportunity, then a corporate fiduciary may not appropriate it for his own benefit. The threshold question is whether a business opportunity constitutes a corporate opportunity. *Southeast Consultants, Inc. v. McCrary Eng. Corp.,* 246 Ga. 503, 273 S.E.2d 112, 117 (1980). It is when, and only when a business opportunity is found to be a corporate one, that the corporate opportunity doctrine applies and liability is properly imposed.

Whether a business opportunity is a corporate one or one within the legitimate scope of the individual interests

of the fiduciary depends upon the facts and circumstances of each case. *Alvest, Inc. v. Superior Oil Corp.*, 398 P.2d 213 (Alaska 1965). The trier of fact, and not an appellate court, must determine whether the opportunity was, in fact, a business opportunity rightfully belonging to the corporation. *Southeast Consultants, Inc., supra.* Commentators recognize that a major problem is to distinguish between those business opportunities that belong to a corporation and those in which the corporate interest is insufficient to require prohibition against a fiduciary's appropriation of that opportunity. This inquiry is necessarily "highly fact sensitive." E. Brodsky & M. Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities,* § 4.01, p. 2 (1984).

Courts differ on the test to be applied when addressing this foundational issue. Common to each of them, however, is the prerequisite that the corporation be able to avail itself of the opportunity. The criterion for imposing liability pursuant to the corporate opportunity doctrine includes as a necessary element whether the corporation, in fact, could have availed itself of the business opportunity in question. This requirement makes sense; without it, no corporate officer or employee could ever engage in any business venture without risking liability to the corporation, even when the corporate plaintiff was not injured nor the defendant unjustly enriched. A review of the commonly applied tests for determining liability pursuant to the corporate opportunity doctrine strengthens Petitioner's argument.

The most permissive test focuses on whether the corporation has an interest already existing or an expectancy growing out of an existing right in the opportunity. *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28

So. 199 (1900). While the nature of the interest or expectancy required is arguable, something more than a "mere hope or desire" for the opportunity is generally required. *Pioneer Oil & Gas Co. v. Anderson,* 168 Miss. 334, 151 So. 161, 164 (1933). When the Second Circuit, for example, articulated this test it stated "the degree of likelihood of realization from the opportunity is the key to whether an expectancy is tangible" and hence a corporate opportunity. *Abbott Redmont Thinlite Corp. v. Redmont,* 475 F.2d 85, 89 (2nd Cir. 1973). A corporation's ability to avail itself of a business opportunity is, necessarily, a part of whether that corporation actually has an interest or expectancy in the opportunity.

Similarly, the "line of business" test, which Production Finishing argued represents the Michigan test, was set forth in *Guth v. Loft, supra.* The Delaware Supreme Court articulated the proper standard:

> "Where a corporation is engaged in a certain business, and an opportunity is presented to it embracing an activity as to which it has fundamental knowledge, practical experience and *ability to pursue,* which, logically and naturally, is adaptable to its business having regard for its financial position and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of the corporation's business." *Guth,* 23 Del. Ch. at 279, 5 A.2d at 514. (Emphasis added).

An integral part of the *Guth* court's test is whether the corporation has the "ability to pursue" the business opportunity in question. This language implies that a corporation's financial or other capacity to undertake the opportu-

nity is highly relevant and necessary to any determination concerning whether a corporate opportunity existed. When, as in the present case, a third party refuses to deal with the corporation, the corporation lacks the ability to pursue that opportunity. The opportunity cannot, therefore, be deemed a corporate one under the *Guth* court's criterion.

A third approach, set forth in *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 199, 80 N.E.2d 522, 529 (1948), examines "the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection." *Durfee*, 323 Mass. at 199, 80 N.E.2d at 529 quoting Ballantine *On Corporations*, 204 (1946). This test was further delineated in *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71 (1974). Under *Miller*, the court engages in a two step process looking first at a variety of factors to determine whether a corporate opportunity, in fact, exists. If the Plaintiff demonstrates that a corporate opportunity existed, the burden shifts to the Defendant to show that he met his fiduciary duties of good faith and fair dealing. The Minnesota Supreme Court included among important factors to consider the following:

> "Whether the business has an interest or an expectancy growing out of an existing contractual right; the relationship of the opportunity to the corporation's business purposes and current activities - whether essential, necessary, or merely desirable to its reasonable needs and aspirations -; whether within or without its corporate powers, the opportunity embraces area adaptable to its business and into which the corporation might easily, naturally, or logically expand; the competitive nature of the opportunity -

> whether prospectively harmful or unfair -; whether the corporation, by reason of insolvency or lack of resources, has the financial ability to acquire the opportunity; and whether the opportunity includes activities as to which the corporation has a fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue." *Miller*, 301 Minn. at 224-25, 222 N.W.2d at 81.

The *Miller* court's analysis is particularly instructive as to the elements included in any determination that a business opportunity should be deemed a corporate one. The court stated:

> "If the facts are undisputed that the business opportunity presented bears no logical or reasonable relation to the existing or prospective business activities of the corporation or that it lacks either the financial or fundamental practical or technical ability to pursue it, then such opportunity would have to be found to be non-corporate as a matter of law. If the facts are disputed or reasonable minds functioning judicially could disagree as to whether the opportunity is closely associated with the existing or prospective activities of the corporation or its financial or technical ability to pursue it, the question is one of fact with the burden of proof resting upon the party attacking the acquisition." 301 Minn. at 225, 222 N.W.2d at 81.

The *Miller* court clearly contemplates consideration of the ability of a corporation to avail itself of a business opportunity as an essential element in proving that opportunity constitutes a corporate one. Thus, when a corporation is unable to avail itself of a business opportu-

nity, it is not unfair for a corporate fiduciary to take advantage of that opportunity for his own benefit. *See e.g., Fliegler v. Lawrence,* 361 A.2d 218 (Del. 1976).

These tests tend to overlap in practice. *Miller,* 301 Minn. at 224, 222 N.W.2d at 81 (1974). Commentators, when describing the application of these tests, have stated:

> "It is difficult to predict precisely when a particular opportunity will be found to be within the corporation's line of business in part because such a finding embodies a conclusion based on a number of factors, including the corporate need for the property, its financial and practical ability to exploit the opportunity, the degree of disclosure, if any, the source of the information as to the existence of the opportunity, and whether the fiduciary has misused corporate resources in developing the opportunity." E. Brodsky & M. Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities,* § 4.02, p. 5 (1984).

However, all three are predicated on the assumption that a corporate opportunity was, in fact, usurped. By refusing to consider evidence concerning a corporation's ability to avail itself of a business opportunity, the Michigan rule, in effect, sets up a criteria for a corporate opportunity but then refuses to permit a party to present relevant evidence as to the initial question of liability. It was just this approach that this Court invalidated in *Vlandis v. Kline,* 412 U.S. 441 (1973). Petitioner suggests that such a scheme offends due process. The right to a fair trial is fundamental to our legal system. As this Court has recognized, to set up a criteria, such as the test for a corporate opportunity, and then refuse to

permit a litigant to defend himself in a fair hearing does violence to the concept of due process.

Under *Vlandis,* the Michigan Court of Appeals' decision arbitrarily deprived Petitioner of a fair hearing when it expanded the rule of *LA Young Spring & Wire Corp. v. Falls,* 307 Mich. 69 (1943). A reading of *LA Young Spring Wire Corp., supra,* shows that past Michigan courts refused to permit a defendant to avoid liability when a third-party's refusal to deal was established entirely by the defendant's uncorroborated testimony. In that case, with reference to the claim of the defendant, Van Hove, that the holder of the patent, Fred Burch, had refused to deal with the plaintiff corporation, the *LA Young Spring & Wire Corp.* Court expressly stated that "Van Hove's testimony in that regard was not corroborated." 307 Mich. at 102. Fred Burch had died prior to the time of trial of *LA Young* and, therefore, his testimony was not presented to the trier of fact. The Supreme Court, concerned with the potential for fabricated testimony, tailored a narrow rule requiring corroboration to establish that no corporate opportunity existed because of a third-party's refusal to deal.

Applying that rule in circumstances like the present violated Petitioner's right to a fair hearing. Petitioner did not rely at trial merely upon the uncorroborated claim of Petitioner that Ford Motor Company would not deal with Production Finishing. The testimony of the decision-making witnesses involved in this particular transaction resolved, once and for all, whether there was any appropriation of an opportunity which rightfully belonged to Production Finishing under the law, i.e. a corporate opportunity. There was not. The Michigan Court of Appeals' expansion of the *LA Young* rule can only be inter-

preted as an arbitrary governmental action which deprived Petitioner of a fundamentally fair hearing. Not only did the court set up a criteria and refuse Petitioner an opportunity to present evidence as to liability in his behalf but it did so when totally unnecessary to achieve the purported purpose, to ensure accurate fact-finding, that the *LA Young* rule was intended to protect.

3. The irrebuttable presumption that the Court of Appeals imposed violates due process because it destroys the allocation of burden of proof and risk of error in civil cases.

The procedural effect of the Michigan rule is to create a mandatory presumption that if a corporate fiduciary becomes involved in a business opportunity and fails to inform the corporation then, therefore, the corporation was deprived of a corporate opportunity available to it. Such mandatory presumptions are only to be sustained as valid under the fundamental concepts of due process if there is a more-likely-than-not rationale connection between the facts proved and the matters to be presumed. *Leary v. United States,* 395 U.S. 6, 36 (1969), *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed,* 219 U.S. 35, 43 (1985).

The Michigan Court of Appeals created an irrebuttable presumption that failure to disclose a refusal to deal necessarily means that the opportunity was, in fact, available to the corporation. The court based its ruling, not on any evidence that such a fact was likely and in the face of a factual determination to the contrary, on a desire to avoid a determination based on facts "largely within the control of the diverter." 158 Mich. App. at 490 quoting Vrudney & Clark, *A New Look at Corporate Opportunities,* 94 Harv. L. Rev. 997, 1021 (1981). The court did so, moreover, even after acknowledging "that it was *unlikely* that Pro-

duction Finishing would have obtained the Ford work." 158 Mich. App. at 488. Since the court's presumption in its own words was "not necessarily or universally true in fact," its procedural operation, virtually permanent and conclusive, fails to survive the test of due process. *See, Vlandis, supra.*

Due process requires a proper standard of proof and an appropriate placement of the burden of proof. In *Matthews v. Eldridge,* 424 U.S. 319 (1976), the court identified three factors, a consideration of which assists in the determination of whether a particular standard of proof satisfies due process. Those three factors are as follows: first, the private interests effected by the proceedings; secondly, the risk of error created by the state's chosen procedure; and thirdly, the counter-vailing governmental interest supporting the use of the challenged procedure. The overall consideration of these factors was summarized by the court in *Addington v. Texas,* 441 U.S. 418, 423 (1979), when it articulated the interplay between a party's due process rights in light of the burden of proof imposed upon that party:

> "The function of a standard of proof, as that concept is embodied in the due process clause and in the realm of fact finding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' [Citation omitted]. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
>
> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At the

> one end of the spectrum is the typical civil case involving the monetary dispute between parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion."

The *Addington* court's instruction that the function of the burden of proof is to minimize the risk of erroneous decisions and to allocate the risk of error equally between the litigants highlights the impropriety of the Michigan court's determination that, notwithstanding the fact that evidence not in Petitioner's control is available, Petitioner will, nevertheless, be prevented from presenting those facts. In other words, the Michigan court's placement of the burden of proof on Petitioner falls short of meeting the demands of due process because it erects an unreasonable barrier to the goal of an equal sharing of the risk of error reflected by *Addington.*

The *Addington* decision was of particular concern to the court in its Opinion in *Santosky v. Kramer,* 455 U.S. 745 (1982). That court, in following the *Addington* decision, emphasized the importance of due process principles in the articulation and placement of the burden of proof in a given case:

> "*Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests effected, but also a societal judgment about how the risk of error should be distributed between the litigants.
>
> Thus, while private parties may be interested intensely in a civil dispute over money damages, appli-

> cation of a 'preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' " 455 U.S. 745, 755.

As explained by the *Santosky* court, the standard of proof in a criminal action is designed to exclude as nearly as possible the likelihood of an erroneous judgment. Consequently, the stringency of a "beyond a reasonable doubt" standard bespeaks the weight and gravity of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impose almost the entire risk of error on itself. To the contrary, the nature of a civil case requires, as between those most interested in its outcome, those being the parties to the action, that the risk of error be equally distributed. When, as here, the burden-shifting presumption fails to maintain the roughly equal allocation of the risk of error, but instead mandates a factual outcome that is "unlikely" and one-sided, Petitioner believes due process is violated.

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DATED: September 21st, 1988

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APPENDIX

(Entered: June 28, 1988)

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

SC: 81144, 81145
COA: 80895
LC: 81-132978-CB

81144(82)
81145(81)

PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellee,
81144

v

PETER F. SHIELDS,
Defendant-Appellant,

and

FLAT ROCK METAL, INC.,
Defendant.

PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellee,
81145

v

PETER F. SHIELDS,
Defendant,

and

FLAT ROCK METAL, INC.,
Defendant-Appellant.

On order of the Court, the motions for reconsideration of this Court's order of March 22, 1988 are considered, and they are DENIED, because it does not appear that the order was entered erroneously.

Levin, J., would grant reconsideration and leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 28, 1988 /s/ Jacqueline B. MacKinnon
(Seal) Deputy Clerk

(Entered: March 22, 1988)

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

SC: 81144, 81145
COA: 80895
LC: 81-132978-CB

81144 & (75)
81145 & (75)
PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellee,

v

PETER F. SHIELDS,
Defendant-Appellant,

and

FLAT ROCK METAL, INC.,
Defendant.

PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellee,

v

PETER F. SHIELDS,
Defendant,

and

FLAT ROCK METAL, INC.,
Defendant-Appellant.

On order of the Court, the motion to file brief *amicus curiae* in support of the applications for leave to appeal is considered, and it is GRANTED.

The applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

March 22, 1988 /s/ Corbin R. Davis
(Seal) Clerk

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 27th day of May in the year of our Lord one thousand nine hundred and eighty-seven

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Docket No. 80895
L. C. No. 81-132978 CB

PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

v

PETER F. SHIELDS and FLAT ROCK METAL, INC.,
Defendants-Appellees,
Cross-Appellants.

Present the Honorable HAROLD HOOD, Presiding Judge,
THOMAS M. BURNS, JOHN X. THEILER, Judges

In this cause Defendants-Appellees, Cross-Appellants have filed a motion for rehearing, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 3rd day of June in the year of our Lord one thousand nine hundred and eighty seven

/s/ Ronald L. Dzierbicki
Chief Clerk

(March 16, 1987)

STATE OF MICHIGAN
COURT OF APPEALS

No. 80895

PRODUCTION FINISHING CORPORATION,
Plaintiff-Appellant
Cross-Appellee,

v

PETER F. SHIELDS and FLAT ROCK METAL, INC.,
Defendants-Appellees
Cross-Appellants.

BEFORE: Hood, P.J., T.M. Burns and J.X. Theiler,* JJ.

PER CURIAM

On August 26, 1981, plaintiff Production Finishing Corporation filed suit against defendants Peter F. Shields and Flat Rock Metal, Inc. (Flat Rock) alleging that Shields had usurped a corporate opportunity of Production Finishing, breached his fiduciary duties as an officer and director of Production Finishing and breached his employment contract with Production Finishing. The trial court granted summary judgment on April 26, 1984, in favor of plaintiff on the breach of employment contract count. Following a jury trial from April 30, 1984, through May 17, 1984, a

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*Circuit Judge sitting on the Court of Appeals by assignment.

verdict was entered in favor of defendants on the remaining counts. Plaintiff appeals as of right from the jury verdict. Defendants appeal as of right from the order for summary judgment in favor of plaintiff.

FACTS

Defendant Shields was president of Production Finishing from January 1974 through August 1981, and was also a member of its Board of Directors. Production Finishing provides goods and services to the automotive industry, which includes the service of steel polishing. In 1981, Production Finishing did most, if not all, of the polishing work in the Detroit area with the exception of the Ford Motor Company (Ford) which had its own polishing plant in Monroe, Michigan. A longstanding objective of Production Finishing was to obtain the Ford business if Ford decided to cease its operations in that area. Shields, as a representative of Production Finishing, approached Ford on a regular basis with proposals to let Production Finishing do their polishing work.

Shields learned that Ford was considering ceasing its polishing operations and Shields brought this information to the attention of Production Finishing's Board of Directors at a meeting on April 29, 1981. Shields suggested to the board that Ford's business might be available and that Production Finishing should pursue the obtainment of Ford's polishing work and consider buying Ford's equipment to set up an additional plant to handle the work. The board requested that Shields continue to investigate the matter.

Pursuant to the board's request, Shields contacted Stan Cronewelt, the manager of the Ford Motor Monroe Plant,

and arranged a meeting at which Production Finishing's proposal was discussed. Cronewelt was against the proposal because, with the Ford business, Production Finishing would have a monopoly in the area. At some point in the discussion, Shields asked Cronewelt if Ford would let him do the work in his individual capacity. In pursuit of this goal, Shields met with another Ford representative, Bill Graning, on May 28, 1981, to discuss the proposal in greater detail. Shields told Graning that if the opportunity did not exist for Production Finishing, he would like to provide the services himself. Subsequently Shields submitted a confidential proposal through his attorney to Ford which provided that he would buy Ford's equipment and provide polishing services to Ford. In the following months, Shields met with Ford representatives on several occasions to finalize these plans.

In further pursuit of this endeavor, Shields had the Ford equipment appraised and sought a loan from Manufacturer's Bank. Flat Rock Metal was incorporated on July 8, 1981, by Shields, with the intent that Flat Rock would perform the polishing services for Ford. Shields is the president and controlling stockholder of Flat Rock.

Throughout these dealings, Shields did not inform the Production Finishing Board of Directors that Ford refused to give its business to Production Finishing, or that Shields was pursuing the opportunities on his own account. Shields did disclose his intentions to Omer O'Neil when he asked O'Neil to leave Production Finishing and go with him to his new company. However, O'Neil was not a member of the Board of Directors and, in fact, reported to Shields at Production Finishing. At one point during trial Shields testified that he did not want Rhoades, Production Finishing's sole stockholder, to know about the Ford endeavor.

It was not until after he resigned in August 1981 that Shields informed the board that he was pursuing the Ford business himself.

ANALYSIS

A

Plaintiff first argues that the trial court erred by failing to grant plaintiff's motion for judgment notwithstanding the verdict on plaintiff's claim that Shields breached his fiduciary duties and diverted a corporate opportunity of plaintiff. We agree.

The jury returned a verdict in favor of defendants, finding that the Ford business and equipment was not a corporate opportunity in which Production Finishing had a reasonable expectancy and further finding that defendant did not breach his fiduciary duties to Production Finishing.

In reviewing the denial of a motion for a judgment notwithstanding the verdict, this Court must give the nonmoving party the benefit of every reasonable inference that could be drawn from the evidence. If reasonable minds could honestly disagree as to whether plaintiffs have satisfied their burden of proof, judgment is improper and the question is to be resolved by the trier of fact. *In re Brack Estate*, 121 Mich App 585, 588; 329 NW2d 432 (1982); *Wilson* v *Chesapeake & Ohio R Co*, 118 Mich App 123, 133; 324 NW2d 552 (1982), *lv den* 417 Mich 1044 (1983). A judgment notwithstanding the verdict is appropriate only if the evidence is insufficient as a matter of law to support a judgment for the nonmoving party. *Slanga* v *Detroit*, 152 Mich App 220, 224; ..... NW2d ..... (1986); *Willoughby* v *Lehrbass*, 150 Mich App 319, 344; 388 NW2d 688 (1986).

Reasonable minds could not honestly disagree in this case. The facts indicate that plaintiff is entitled to a judgment as a matter of law. Shields breached his fiduciary duties to the corporation by diverting a corporate business opportunity for his own personal gain. Shields did so when he pursued the Ford polishing business and purchased the Ford equipment while president of Production Finishing without full disclosure to the corporation.

It is widely recognized that the appropriation of a corporate opportunity by an officer or director will constitute an actionable breach of fiduciary duties:

> "A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself. If he does, the corporation may claim the benefit of the transaction." 18B Am Jur 2d, *Corporations*, §1770 (1985), pp 623-624; see also 19 CJS §785 (1940) p 161; Annot 17 ALR 4th 479

It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve. *Salva-*

dor v *Connor,* 87 Mich App 664, 675; 276 NW2d 458 (1978), *lv den* 406 Mich 966 (1979). In regard to a corporate officer who acts as an agent of the corporation, the Supreme Court has stated:

> "[A]s to engaging in other business, it is an elemental rule of agency that his duties required his efforts and activities in the line of his employment should be for the benefit of his principal, and he was not at liberty to deal in the business of his agency for his own benefit. It was his duty to communicate to his principal facts relating to the business which ought in good faith be made known to the latter. * * * The corollary to that fundamental rule is thus concisely stated in 1 Mechem on Agency (2d Ed.), §1224:
>
> " 'The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency.'
>
> "Where the agent is also an officer of a corporation for which he is acting there is added reason for rigidly adhering to the rule." *Michigan Crown Fender Co* v *Welch,* 211 Mich 148, 159, 160; 178 NW 684 (1920).

The Supreme Court has also quoted from Mechem's Outlines of Agency (1901 ed) §148, stating:

> "Except with the full knowledge and consent of his principal, an agent authorized to buy for his principal cannot buy of himself; an agent authorized to sell cannot sell to himself; an agent authorized to buy or sell for his principal cannot buy or sell for himself; nor can an agent take advantage of the knowledge acquired of his principal's business to make profit for himself at his principal's expense." *Stephenson* v *Golden,* 279 Mich 710, 736; 276 NW 849 (1937).

If an agent acquires any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer for the profit made. *Id.*

There can be no dispute in this case that the potential purchase of Ford's polishing business, as well as the equipment, was, at least initially, a business opportunity which Production Finishing had an interest in and was actively pursuing. Production Finishing was in the automotive polishing business and had a large share of the area market. In fact, it appears that Ford was the last holdout. Production Finishing actively pursued Ford's business throughout Shields' tenure as president. Shields does not dispute that while president and a director of Production Finishing he initiated the idea with Ford representatives that he, in his individual capacity, should do Ford's polishing business. In furtherance of this pursuit, he arranged for loans to purchase Ford's equipment, leased an industrial building, organized Flat Rock Metal, and talked to Production Finishing employees about employment with Flat Rock. All of these acts acts were carried out without disclosure, of any kind, to Production Finishing's Board of Directors. These facts establish a prima facie case in favor of plaintiff.

However, defendants have defended this case by arguing that because of Ford's refusal to deal with Production Finishing, they should not be held liable. Defendants contend that while the potential purchase of Ford's business may have initially been a corporate opportunity for Production Finishing, it ceased to be such an opportunity when Ford's representatives indicated their unwillingness to deal with Production Finishing. The trial testimony indicates that it was unlikely that Production Finishing would have obtained the Ford work. Stanley Cronewelt, plant manager at the Ford Monroe Plant, testified that he did not want to sell Ford's polishing equipment to Production Finishing because they were the only independent polishing source at the time. He felt it would be a better business deal for Ford if there were at least two independent suppliers of the steel polishing services. Carl Granning, steel purchasing agent at Ford, testified that inferences he received from his superiors were that the Ford business should not go to Production Finishing because it was the only company in the area providing the polishing services. John Scicluna, director of facilities and tool purchasing at Ford, testified that he disregarded Production Finishing as a potential purchaser of the Ford equipment because Production Finishing would then have been a monopoly. Scicluna testified that even if Production Finishing made a more attractive offer, or if Shields had not made an offer on his own behalf, Ford would not have sold the equipment to Production Finishing.

Despite this testimony, we must conclude that defendants remain liable.

In *Energy Resources Court, Inc* v *Porter*, 14 Mass App 296, 394; 438 NE2d 391 (1983), the Massachusetts Court stated:

> "For the reason that the firmness of a refusal to deal cannot be adequately tested by the corporate executive alone, it has not been favored as a defense unless the refusal has first been disclosed to the corporation. Without full disclosure it is too difficult to verify the unwillingness to deal and too easy for the executive to induce the unwillingness."

The Court further stated:

> "[B]efore a person invokes refusal to deal as a reason for diverting a corporate opportunity he must unambiguously disclose that refusal to the corporation to which he owes a duty, together with a fair statement of the reasons for that refusal." *Id.* at 395.

We agree with the analysis of the Massachusetts Court and hold that a third party's purported refusal to deal with a corporation will not relieve a fiduciary from liability when he has failed to disclose the refusal to his principal. The reason behind this rule was set out in *Corporate Opportunities*, 94 Harv L Rev 997, 1021, as follows:

> "[I]f financial disabilities or third-party refusals to deal with the corporation are accepted as tests, the inevitable result will be to permit the diversion. This is true because courts must resolve the legal issues on the basis of a set of facts largely within the control of the diverter."

Shields did not satisfy the duty of disclosure which he owed to Production Finishing. The disclosure of information to a lower level employee for the purpose of inducing that person to leave the company does not satisfy a fiduciary's duty to disclose relevant information to his principal.

We conclude that reasonable persons could not disagree that Shields violated his fiduciary duties by diverting the Ford business and equipment for his own personal gain. Therefore, the trial court should have granted plaintiff's motion for judgment notwithstanding the verdict.

B

Plaintiff next argues that several jury instructions were erroneous and that the special verdict form was inappropriate.

Due to our disposition of the previous issue, we need not address plaintiff's claims in this regard. However, we note that the instructions were erroneous to the extent that they were inconsistent with the foregoing analysis.

C

On cross-appeal, defendants argue that the trial court erred by granting summary judgment in favor of plaintiff in regard to plaintiff's breach of employment contract claim. We disagree.

The 1979 employment agreement between Production Finishing and Shields provided for the payment of bonuses to Shields in paragraph 3 as follows:

> "In consideration of the covenants set forth in this Agreement, concurrently with the execution of this Agreement the Company is paying Shields the sum of $50,000 (subject to applicable withholding taxes) receipt of which is hereby acknowledged. In addition, subject to the provisions hereof, the Company agrees to pay Shields the sum of $300,000 (subject to all applicable withholding taxes) payable $100,000 on January 31 of each of 1981, 1982 and 1983."

These bonuses were to be paid in addition to a $100,000 salary provided elsewhere in the contract. The contract also contained a "non-compete" agreement. While some portions of the agreement actually required that Shields not engage in competitive activities, other portions merely provided that if Shields did engage in competitive activities, he would be required to refund the bonus payments:

> "Shields recognizes that if he should engage in any competitive activities (as hereinafter defined) the same would cause irreparable harm to the Company and its business and goodwill, the amount of which would be difficult or impossible to calculate. Accordingly, Shields agrees that in the event that during the period of three years after the termination of Shields' employment with the Company Shields in any capacity, directly or indirectly, shall engage in, or be retained or employed by, or have any interest in or connection with, any person, firm, partnership, or corporation which is in whole or in part engaged in, any business which is in competition with the business in which the Company is now or may from time to time hereafter while Shields is employed by the Company be engaged (collectively called 'competitive activities'), Shields shall refund to the Company, within five days after request therefor by the Company, an amount equal to the lesser of (i) $250,000 or (ii) the total consideration theretofore paid by the Company under Paragraph 3 above, and to the extent that amount actually refunded by Shields shall be less than $250,000, the next payments which would otherwise be payable under Paragraph 3 above shall be reduced by the amount of such deficiency."

Defendant argues that these contract refund provisions are void under MCL 445.761; MSA 28.61. That statute declared that contracts not to engage in business were illegal:

> "All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

While the statute was repealed by the legislature effective March 29, 1985, a covenant unenforceable under the former statute did not become enforceable upon its repeal. See *Compton* v *Lepak*, ... Mich App .....; ..... NW2d ..... (Docket No. 87056, rel'd 9/8/86).

We conclude that the statute did not render the refund provisions of the contract void in this case. The contract specifically indicates that if any provision or clause is void, the other provisions and clauses remain in effect. Thus, even if the contract contained void non-competition provisions or clauses, the refund provisions remained in effect. The refund provisions did not extract or embody a promise not to engage in employment or business after the termination of Shields' employment. Those provisions merely required Shields to forfeit his bonuses if he did so. Even though a certain contract provision is likely to deter an employee from engaging in competition, such a provision which merely deters is not improper under the statute. See *Woodward* v *Cadillac Overall Co*, 396 Mich 379; 240 NW2d 710 (1976); *Couch* v *Difco Lab, Inc*, 44 Mich App 44; 205 NW2d 24 (1972).

Even if the refund provisions were invalid, plaintiff would be entitled to a return of the money which was taken by Shields as consideration for agreeing to the provisions.

Defendants also argue that the provisions were an unreasonable restraint of trade under the common law. We disagree. For an agreement which is in restraint of trade to be enforced, it must be reasonable. *Follmer Rudzewicz & Co, P.C.* v *Kosco,* 420 Mich 394, 408 (1984). Generally, the courts have looked at three interests when determining whether agreements in restraint of trade are reasonable: "the public interest, the former employee's interest in continuing employment, and the interest of the employer." *Id.* The Court in *Kosco* quoted favorably from the early case of *Hubbard* v *Miller,* 27 Mich 15, 19 (1873), as follows:

> "[I]f, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid." 420 Mich at 408-409, n 21.

The forfeiture provision in the instant agreement is not unreasonable. The agreement appears to have been made for a just and honest purpose. It was apparently made for the protection of the legitimate interest of Production Finishing and does not appear to be specifically injurious to the public. It was not unreasonable

for Production Finishing to want to retain a valuable executive who had access to valuable and confidential corporate information. The agreement was not an unreasonable restraint of trade.

Thus, the circuit court did not err in granting summary judgment in favor of plaintiff in regard to the breach of employment contract claim.

D

Finally, defendants argue that plaintiff's recovery for breach of the employment contract bars recovery of any damages for Shields' breach of fiduciary duties and usurpation of a corporate opportunity because of the application or the doctrine of election of remedies. We disagree.

The doctrine of election of remedies is "a procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both". *Riverview Cooperative, Inc* v *First National Bank & Trust Co*, 417 Mich 307, 311; 337 NW2d 225 (1983). "Its purpose is not to prevent recourse to alternative remedies, but to prevent double redress for a single injury". *Id.* at 312. In order for the doctrine to apply, three prerequisites must exist: (1) at the time of the election, there must have been two or more remedies available; (2) the alternative remedies must be inconsistent rather than consistent and cumulative; and (3) the party must have chosen and pursued one remedy to the exclusion of the other(s). *Id.* at 312-313; see also 25 Am Jur 2d Election of Remedies, §8, p 652. The test of inconsistency was set out in 25 Am Jur 2d, Election of Remedies, §11, pp 653-654 as follows:

> "For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. More particularly, where the election of a remedy assumes the existence of a particular status or relation of the party to the subject matter of litigation, another remedy is inconsistent if, in order to seek it, the party must assume a different and inconsistent status or relation to the subject matter."

The election of remedies doctrine does not apply in this case because the remedies sought by plaintiff are concurrent and cumulative rather than inconsistent. In Counts I and II, plaintiff sought damages for breach of fiduciary duties and diversion of a corporate opportunity. In Count III, plaintiff sought damages for breach of an employment contract. Although all three counts arose out of the same course of conduct by Shields, they each allege different legal claims and the first two sought different damages from the third, i.e., lost profits as opposed to bonuses. The first two counts were not necessarily repugnant to the third and did not require proof of facts which the third denied. Defendants' claim that the doctrine of elections of remedies applies to bar recovery by plaintiff under more than one count is without merit.

CONCLUSION

The grant of summary judgment is affirmed; the denial of plaintiff's motion for judgment notwithstanding the verdict is reversed; and the case is remanded for further proceedings regarding damages for defendant Shields' breach of his fiduciary duties and usurpation of a corporate opportunity.

/s/ Harold Hood
/s/ Thomas M. Burns
/s/ John X. Theiler

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

Case No. 81 132 978 CB
Hon. Charles Kaufman

PRODUCTION FINISHING CORPORATION,
Plaintiff,

v

PETER F. SHIELDS and FLAT ROCK
METAL, INC.,
Defendants,

CARL J. MARLINGA (P 17102)
RICHARD K. WRAY
Attorneys for Plaintiff

B. I. STANCZYK (P 20890)
ANTHONY J. RUSCIANO (P 29834)
Attorneys for Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR N.O.V., OR IN THE ALTERNATIVE, FOR NEW TRIAL

At a regular session of the Wayne County Circuit Court held and for said Court in its courtrooms at the City-County Bldg., Detroit, MI on September 20, 1984

PRESENT: THE HON. CHARLES KAUFMAN

This matter having come before the Court on Plaintiff's Motion for N.O.V. or in the alternative, for New Trial, and the court having been fully advised in the premises;

IT IS HEREBY ORDERED, that Plaintiff's Motion for N.O.V. and for New Trial, be Denied.

/s/ Charles Kaufman
Circuit Court Judge

(Filed June 19, 1984)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

No. 81 132978 CB
HON. CHARLES KAUFMAN

PRODUCTION FINISHING CORPORATION,
Plaintiff,

vs.

PETER F. SHIELDS and FLAT ROCK METAL, INC.,
Defendants.

CARL J. MARLINGA (P17102)
Attorney for Plaintiff

B. I. STANCZYK (P20890)
ANTHONY J. RUSCIANO (P29834)
Attorneys for Defendants

ORDER GRANTING JUDGMENT OF NO CAUSE FOR ACTION

At a session of said Court held in the County of Wayne and State of Michigan on June 19, 1984

PRESENT: HON. CHARLES KAUFMAN, Circuit Court Judge

This matter having come before the Court upon a jury trial which was conducted on April 26; 30; May 1;

2; 3; 7; 8; 9; 10; 14; 15; 16 and 17, 1984; and the jury, after due deliberation, having returned a verdict on special questions entitling Defendants Peter F. Shields and Flat Rock Metal, Inc. to a verdict of no cause for action;

NOW, THEREFORE, IT IS HEREBY ORDERED that a judgment of no cause for action is hereby entered on behalf of Defendants Peter F. Shields and Flat Rock Metal, Inc.

IT IS FURTHER ORDERED that the questions of attorneys fees and costs with respect to this matter shall be determined by the Court upon motion of the parties.

SO ORDERED.

/s/ Charles Kaufman
Circuit Court Judge

Approved As To Form And
Notice of Entry Waived:

Plunkett, Cooney, Rutt, Watters,
Stanczyk & Pedersen

By: /s/ Anthony J. Rusciano
Boleslaus I. Stanczyk (P20890)
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Bushnell, Gage, Doctoroff & Reizen

By: /s/ Richard K. Wray

Arnstein, Gluck, Lehr,
Barron & Milligan

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

#81 132 978 CZ

PRODUCTION FINISHING CORPORATION,
Plaintiff,

v

PETER S. SHIELDS AND FLATROCK
METAL, INC.,
Defendants.

TRIAL

Before the Honorable Charles Kaufman,
Judge

Detroit, Michigan - Thursday,
May 17, 1984

APPEARANCES:

RICHARD WRAY, ESQ.
ANTHONY RUSCIANO, ESQ.
Appearing on behalf of the Plaintiff

BOLESLAUS I. STANCZYK, ESQ.
CARL MARLINGA, ESQ.
Appearing on behalf of the Defendants

INDEX

Witnesses:
(None.)

Exhibits:
(None.)

Verdict 30

* * *

* * * [31] Sheriff, please?

Okay. Let the record show that the Sheriff has handed me the special verdict questions and I'll read them into the record.

Number one, was the Ford bumper steel polishing business a corporate opportunity in which Production Finishing had a reasonable expectancy?

Answer no.

Was the purchase of the Ford steel polishing equipment a corporate opportunity in which Production Finishing had a reasonable expectancy?

No.

Then, in accordance with the instructions, question 3, 4, 5, and 6 were not answered.

Number 7. Did Defendant Shields breach his fiduciary duties to Plaintiff from '81, through August, '81?

Answer no.

And, of course, per the instructions the others were left blank.

Mr. Boyne, you're the foreperson?

SEAT 2: Yes.

THE COURT: Would you stand up?

You've heard the answers which the Court read into the record. Are those, in fact, the answers of * * *.

* * *

No. 88-499

Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States
October Term, 1988

PETER F. SHIELDS,
Petitioner,

vs.

PRODUCTION FINISHING CORPORATION,
Respondent,

and

FLAT ROCK METAL, INC.
Defendant.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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26 pp

QUESTIONS PRESENTED

1. Does a state appellate court's application of the common law rule, that a fiduciary must make a full and fair disclosure and receive the consent of his principal before the fiduciary may act in his personal interest with respect to the subject matter of the agency, violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Does the United States Supreme Court have jurisdiction to decide a purported constitutional issue neither addressed nor decided by the Michigan state courts below?

LIST OF PARTIES

Respondent, Production Finishing Corporation*, was the appellee in the proceedings before the Michigan Supreme Court, and was the appellant-cross-appellee in the proceedings before the Michigan Court of Appeals.

Petitioner, Peter F. Shields was one of the appellants before the Michigan Supreme Court and was one of the appellees-cross-appellants before the Michigan Court of Appeals.

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* The list of the parents, subsidiaries and affiliates of Production Finishing Corporation as required by Rule 28.1 is set forth in the Appendix hereto.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

A. No Constitutional Issue is Involved Where the Ruling of the Michigan Court of Appeals Neither Expressly Nor Implicitly Adopted any Irrebuttable Presumption 7

1. The Corporate Opportunity Doctrine 7

2. The Disclosure Requirement as an Element of the Affirmative Defense of Refusal to Deal 9

B. There is No Denial of Due Process in the Application of the General Rules of Fiduciary Duties by the Michigan Court of Appeals 11

C. This Court Lacks Jurisdiction to Decide a Purported Constitutional Issue Not Passed Upon by the State Courts Below 14

CONCLUSION 18

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: *Page*

Battle Creek Foods Co. v. Kirkland, 298 Mich. 515, 299 N.W. 167 (1941) 8, 10

Bliss Petroleum Co. v. McNally, 254 Mich. 569, 237 N.W. 53 (1931) 8

Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) 11, 12

Energy Resources Corp. v. Porter, 14 Mass. App. 296, 438 N.E.2d 391 (1982) 8, 10, 14

Equity Corp. v. Milton, 221 A.2d 494 (Del. Supr. 1966) 8

Heiden Realty Co. v. Brown, 243 Mich. 579, 220 N.W. 699 (1928) 8

Imperial Group (Texas), Inc. v. Scholnick, 709 S.W.2d 358 (Tex. App. 1986) 10

Kelly v. 74 & 76 West Tremont Avenue Corp., 4 Misc.2d 533, 151 N.Y.S.2d 900 (1956) 10

Kerrigan v. Unity Savings Ass'n., 58 Ill.2d. 20, 317 N.E.2d 39 (1974) 8

Klinicki v. Lundgren, 298 Or. 662, 695 P.2d 906 8

L.A. Young Spring & Wire Corp. v. Falls, 307 Mich. 69, 11 N.W.2d 329 (1943) 7, 8, 10

Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 178 N.W. 684 (1920) 8, 9

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) 12

Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 N.W. 19 (1909) 8

Cases: *Page*

Production Finishing Corp. v. Shields, 158 Mich. App. 479, 405 N.W.2d 171 (1987) 3, 7, 8, 9, 11

Stanley v. Illinois, 405 U.S. 645 (1972) 11, 12

Stephenson v. Golden, 279 Mich. 710, 276 N.W. 848 (1937) 9

Street v. New York, 394 U.S. 576 (1969) 16

Thomas v. Satfield Co., 363, Mich. 111, 108 N.W.2d 907 (1961) 9

Toll v. Moreno, 458 U.S. 28 (1982) 14

United States v. Locke, 471 U.S. 84 (1985) 12

Usery v. Turner Alcorn Mining Co., 428 U.S. 1 (1976) 12

Vlandis v. Kline, 412 U.S. 441 (1973) 11, 12, 14

Webb v. Webb, 451 U.S. 196 (1981) 16, 17

Weinberger v. Salfi, 422 U.S. 749 (1975) 12, 13

STATUTES AND COURT RULES:

28 U.S.C. §1257(3) 2, 15

Supreme Court Rule 17.1 17

Supreme Court Rule 21.1 (h) 16

OTHER AUTHORITIES:

Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* §17.6 (1986) 12

No. 88-499

In The
Supreme Court of the United States
October Term, 1988

PETER F. SHIELDS,

Petitioner,

vs.

PRODUCTION FINISHING CORPORATION,

Respondent,

and

FLAT ROCK METAL, INC.

Defendant.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

OPINIONS BELOW

The Michigan Supreme Court denied petitioner's application for leave to appeal without issuing any opinion. The opinion of the Michigan Court of Appeals is reported at 158 Mich. App. 479, 405 N.W.2d 171 (1987), *lv. denied,* 430 Mich. 859, 421 N.W.2d 903 (1988).

JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). For the reasons stated in this brief, respondent challenges the claim of jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision allegedly involved in this case is Section 1 of the Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case

Production Finishing Corporation initiated this lawsuit against Peter F. Shields, the former president of Production Finishing, and Flat Rock Metal, Inc., a corporation formed by Shields. Production Finishing seeks damages or disgorgement of profits resulting from Shields' misappropriation of a corporate opportunity and his breach of fiduciary duties.

The claims arose from Shields' conduct in forming Flat Rock to acquire steel polishing equipment from Ford Motor Company and to perform polishing services for Ford. Shields had initially pursued these opportunities on behalf of and at the specific request of the board of

directors of Production Finishing. However, beginning in May 1981, while retaining the position of president of Production Finishing, Shields secretly and successfully undertook a plan to acquire the equipment and business for himself and his corporation, Flat Rock.

Proceedings in State Court

At trial, the jury returned a verdict in favor of defendants on the questions of theft of a corporate opportunity and breach of fiduciary duties. Production Finishing appealed and Shields cross-appealed the entry of summary judgment in favor of Production Finishing on a contract count which is not before this Court.

On March 16, 1987, the Michigan Court of Appeals ruled that, based on the undisputed evidence, "reasonable minds could not honestly disagree" that Shields had violated his fiduciary duties and misappropriated a corporate opportunity. *Production Finishing Corp. v. Shields,* 158 Mich. App. 479, 485, 405 N.W.2d 171 (1987). The Court of Appeals concluded that as a matter of law Production Finishing was entitled to judgment notwithstanding the verdict, and the case was ordered remanded for a trial on damages. Shields and Flat Rock filed a motion for rehearing, which was denied on June 3, 1987.

Shields and Flat Rock both sought leave to appeal to the Michigan Supreme Court. On March 22, 1988, that court denied the application for leave to appeal. Shields and Flat Rock filed separate motions for reconsideration, both of which were denied on June 28, 1988.

The first time Shields purported to raise any issue under the Constitution of the United States[1] was in his reply brief in support of his application for leave to appeal to the Michigan Supreme Court. Flat Rock did not raise the argument at any point, and it has not petitioned this Court for a writ of certiorari. No court has addressed the alleged constitutional issue.

Statement of Facts

Throughout the time relevant to this case, Production Finishing was engaged in the business of polishing sheets of steel. In April 1981, Production Finishing was the only company in the Detroit area which provided polishing services for steel to be used as bumpers by automobile manufacturers, which did not also provide services such as stamping or plating the steel. (Tr. April 30, 1984, pp. 151-152; May 1, 1984, p. 180; May 9, 1984, p. 138). At that time, there were two American automobile plants which still did their own bumper steel polishing. One of these was Ford's plant in Monroe, Michigan. The other was a Chevrolet plant. Those two companies were Production Finishing's principal target customers for future expansion in the event that either manufacturer stopped doing its own polishing. (Tr. May 2, 1984, p. 82; May 10, 1984, p. 13). At trial, Shields testified that it was important to Production Finishing to obtain the Ford business. The opportunity to do Ford's polishing was an opportunity within Production Finishing's principal line of business. (Tr. April 30, 1984, pp. 176, 180-181).

In early 1981, Ford's Monroe plant manager, Stanley Cronenwett, invited Production Finishing to provide

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[1] Indicative of the degree of care and attention devoted to the issue by Shields' counsel in the state court, he purported to raise an issue of violation of the Due Process Clause of the Fifth Amendment rather than the Fourteenth Amendment.

quotes for Ford's polishing. (Tr. April 30, 1984, p. 185). By mid-March of 1981, Production Finishing had learned that Ford was considering relying entirely on outside sources for bumper polishing. (Tr. April 30, 1984, p. 188). On April 20, 1981, Production Finishing, in a letter signed by Shields, quoted Ford prices for all of its bumper polishing work. (Tr. May 1, 1984, pp. 12, 17, 21).

The board of directors of Production Finishing met on April 29, 1981, and expressly instructed Shields to continue to investigate the Ford opportunity. (Tr. April 30, 1984, pp. 160-161). Shields testified at trial that at the time of the board meeting, the potential Ford business was understood to be a corporate opportunity of Production Finishing. (Tr. May 1, 1984, pp. 21-22).

Nevertheless, in the course of Shields' next meeting with Cronenwett, Shields asked what the plant manager would think of Shields taking the polishing business for himself. Mr. Cronenwett said that he would consider Shields' personal proposal. (Tr. May 2, 1984, pp. 33-35).

Cronenwett had expressed a reservation that if Ford's business went to Production Finishing, then Production Finishing would be "the only game in town". However, Shields never conveyed Cronenwett's concern to the board of directors of Production Finishing. (Tr. May 1, 1984, p. 35). Nor did Shields disclose the efforts he undertook in his own behalf to obtain the Ford business. (Tr. May 1, 1984, p. 56). Instead, he secretly undertook a series of meetings with Ford employees through which he negotiated and obtained a contract with Ford for Flat Rock. (Tr. May 1, 1984, pp. 51, 96, 130-133). All of these activities were undertaken by Shields while he retained his positions as the president and as a director of Production Finishing.

During that period, when the chairman of the board of Production Finishing inquired as to the status of the

efforts to obtain the Ford business for Production Finishing, Shields responded that "things were fine with the Ford prospect." (Tr. May 1, 1984, p. 68). The other directors of Production Finishing learned nothing of Mr. Shields' activities until after he had resigned. (Tr. May 2, 1984, p. 127).

Shields resigned from Production Finishing on August 20, 1981, effective on the same day on which he and Ford executed the contracts transferring the Monroe polishing equipment and Ford's business to Flat Rock Metal.

At trial Shields defended his theft of the corporate opportunity by claiming that Ford would have refused to deal with Production Finishing.

REASONS FOR DENYING THE WRIT

A. No Constitutional Issue is Involved Where the Ruling of the Michigan Court of Appeals Neither Expressly Nor Implicitly Adopted any Irrebuttable Presumption.

Petitioners' entire argument is founded on the erroneous assumption that the ruling of the Michigan Court of Appeals in this case adopted an irrebuttable presumption. Such an argument is based on either a fundamental misunderstanding or an intentional distortion of the court's ruling. As conceived by Shields' counsel, the so-called presumption apparently would be that a corporate opportunity would be concluded to exist in every case in which a corporate fiduciary has failed to disclose an alleged refusal to deal. The court made no such holding.

The ruling of which petitioner complains consists of nothing more novel or controversial than the application of the general common law rules of fiduciary duties. These rules were well settled long ago, even before the numerous Michigan Supreme Court decisions from the early part of this century upon which the lower court based its ruling. See, *Production Finishing Corp. v. Shields,* 158 Mich. App. 479, 486-489, 405 N.W.2d 171 (1987).

1. The Corporate Opportunity Doctrine

It is well established that the principle sometimes referred to as the "corporate opportunity doctrine" is a corollary to the more general fiduciary duty owed by an officer or director to his corporation. Michigan courts, consistent with other American jurisdictions, have insisted upon strict adherence by a corporate fiduciary to his duties of loyalty and fairness. See, *L.A. Young Spring & Wire Corp. v. Falls*, 307 Mich. 69, 99-101, 11

N.W.2d 329, 340-341 (1943); *Battle Creek Foods Co. v. Kirkland,* 298 Mich. 515, 521-522, 299 N.W. 167, 169 (1941); *Bliss Petroleum Co. v. McNally,* 254 Mich. 569, 573, 237 N.W. 53, 55 (1931); *Heiden Realty Co. v. Brown,* 243 Mich. 579, 585, 220 N.W. 699, 702 (1928); *Michigan Crown Fender Co. v. Welch,* 211 Mich. 148, 159-160, 178 N.W. 684, 688 (1920); *Pikes Peak Co. v. Pfuntner,* 158 Mich. 412, 415, 123 N.W. 19, 20 (1909).

The fiduciary's duties have consistently been ruled to preclude his acquiring for himself a business opportunity which is within the line of business of the corporation which he serves. See, e.g., *Equity Corp. v. Milton,* 221 A.2d 494, 497 (Del. Supr. 1966); *Klinicki v. Lundgren,* 298 Or. 662, 695 P.2d 906, 918 (1985); *Kerrigan v. Unity Savings Ass'n.*, 58 Ill.2d. 20, 28, 317 N.E.2d 39 (1974); *L. A. Young Spring & Wire Corp. v. Falls,* 307 Mich. 69, 95, 11 N.W.2d 329, 339 (1943); *Energy Resources Corp. v. Porter,* 14 Mass. App. 296, 438 N.E.2d 391, 393 (1982).

As the court below observed, applying the line of business test to the present facts:

> There can be *no dispute* in this case that the potential purchase of Ford's polishing business, as well as the equipment, was, at least initially, a business opportunity which Production Finishing had an interest in and was actively pursuing.

Production Finishing Corp. v. Shields, 158 Mich. App. 479, 487, 405 N.W.2d 171 (1987) (emphasis added). Where the facts establishing the existence of a corporate opportunity are undisputed, and further where the court of appeals has concluded that the jury instructions given were erroneous, the jury's answer to a special interrogatory finding that no corporate opportunity existed, is meaningless.

However, the court of appeals' ruling that a corporate opportunity existed as a matter of law was not enough, standing alone, to decide this case. The court acknowledged that under certain circumstances a refusal to deal with the corporation, on the part of the party with whom the opportunity to do business existed, can give rise to an affirmative defense. It proceeded to consider what was necessary to establish that defense.

2. The Disclosure Requirement as an Element of the Affirmative Defense of Refusal to Deal

One of the basic tenets of fiduciary responsibility is that, in dealing with the affairs of his principal, the fiduciary must refrain from acting where his personal interest is involved, unless he first fully discloses all material facts and obtains the principal's consent. See, *Thomas v. Satfield Co.,* 363, Mich. 111, 117, 108 N.W.2d 907, 910 (1961); *Stephenson v. Golden,* 279 Mich. 710, 737, 276 N.W. 848, 858 (1937); *Michigan Crown Fender Co. v. Welch,* 211 Mich. 148, 159, 178 N.W. 684, 688 (1920). The court below expressly recognized this well established disclosure rule. It quoted language from the *Stephenson* decision setting forth the requirements of knowledge and consent by the principal as prerequisites to allowing self-dealing by an agent. *Production Finishing Corp. v. Shields,* 158 Mich. App. 479, 487, 405 N.W.2d 171 (1987). Because Production Finishing had no knowledge of Shields' self-dealing and did not consent, the Court concluded that Shields had breached his fiduciary duties.

The fact that the court adopted no presumption, conclusive or otherwise, in order to reach its decision, is apparent from the foregoing discussion. However, the lack of a presumption is even more clear when Shields' claim of refusal to deal is viewed as an affirmative defense. As noted by the court below, Production Fin-

ishing had proven its prima facie case when it established the existence of a corporate opportunity in its line of business. Shields then, in order to prove his affirmative defense, needed to establish three elements; (1) a refusal to deal on the part of Ford, (2) full and fair disclosure by Shields to Production Finishing regarding the alleged refusal, and (3) consent by Production Finishing to Shields proceeding in his own interest. Because it was undisputed that Shields had not disclosed either the alleged refusal to deal or his own efforts to claim the opportunity for his personal benefit, the court found it unnecessary to address the disputed issue of refusal to deal. There was no presumption that Ford would have dealt with Production Finishing. It was simply not necessary to consider that element of the affirmative defense where Shields had clearly failed to adduce evidence of the other elements of the defense. *Id.* at 489-490.

Well before the decision in the pending case, the law in Michigan, as well as every other jurisdiction which has considered the question, was that a fiduciary's failure to disclose all facts material to an alleged refusal to deal defeats that defense to a claim of theft of a corporate opportunity. See, e.g., *L. A. Young Spring & Wire Corp. v. Falls,* 307 Mich. 69, 102, 11 N.W.2d 329, 341 (1943); *Battle Creek Foods Co. v. Kirkland,* 298 Mich. 515, 299 N.W. 167, 174 (1941); *Imperial Group (Texas), Inc. v. Scholnick,* 709 S.W.2d 358, 363 (Tex. App. 1986); *Energy Resources Corp. v. Porter,* 14 Mass. App. 296, 438 N.E.2d 391, 395 (1982); *Kelly v. 74 & 76 West Tremont Avenue Corp.*, 4 Misc.2d 533, 537, 151 N.Y.S.2d 900 (1956). The Michigan court simply followed the established rule.

Shields had every opportunity to introduce evidence of disclosure and consent. His feeble argument that he made an adequate disclosure of his scheme by revealing it to one of his subordinates, whom he was attempting

to induce to leave Production Finishing along with him, was rejected out of hand by the court below. *Production Finishing Corp. v. Shields, supra*, 158 Mich. App. at 490.

B. There is No Denial of Due Process in the Application of the General Rules of Fiduciary Duties by the Michigan Court of Appeals

Not only is it the case that no "irrebuttable presumption" was adopted by the Michigan Court of Appeals, but the very doctrine upon which Shields attempts to rely is completely inapplicable. The concept that certain "irrebuttable presumptions" violate the Due Process Clauses of the Fifth or Fourteenth Amendments has been confined to a few decisions relating to the effect of specific statutory presumptions. This Court has never applied the principle to judicial decisions as opposed to legislatively creative presumptions. The concept that a statutory "irrebuttable presumption" constitutes a denial of due process was a notion followed in a few decisions of this Court in the early seventies. See, e.g., *Cleveland Bd. of Educ. v. La Fleur,* 414, U.S. 632, 646 (1974); *Vlandis v. Kline,* 412 U.S. 441, 446 (1973); *Stanley v. Illinois,* 405 U.S. 645, 657-58 (1972).

Even if we were to assume that the court's ruling was legislation and to further assume that the "irrebuttable presumption" analysis retained validity, the rule in question still would not offend due process. In upholding a theoretically analogous disclosure provision of the Truth in Lending Act against such a due process challenge, this Court reasoned:

> The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all

> members of a defined class in order to discourage evasion by a substantial portion of that class.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973). Likewise, the common law rule in the pending case merely requires those who seek to capitalize on corporate opportunities to disclose their actions so as to discourage evasion of their fiduciary duties.

On a more fundamental level, considered analysis of the cases upon which Shields attempts to rely has made it readily apparent that the rulings actually rest on an equal protection rationale. In each case, the objectionable aspect of a statutory provision was the arbitrary manner in which it classified individuals. Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* §17.6, p. 246 (1986). The use of irrebuttable presumption language has been characterized as a "conceptually confused" method of justifying independent judicial review of legislative classifications. *Id.* at 248. *La Fleur* and the cases leading up to it gave rise to a flurry of academic commentary criticizing the doctrine of "irrebuttable presumptions" under the Due Process Clause. *Id.* at 246, n.4. Since the time that *La Fleur* was decided in 1974, this Court has repeatedly rejected claims that various legislative classifications constitute irrebuttable presumptions. See, e.g., *United States v. Locke,* 471 U.S. 84, 98, 103 (1985); *Usery v. Turner Alcorn Mining Co.,* 428 U.S. 1, 22-24 (1976); *Weinberger v. Salfi,* 422 U.S. 749, 772 (1975).

The decisions in *Stanley, Vlandis* and *La Fleur* were expressly limited by the Court in *Weinberger v. Salfi,* 422 U.S. 749, 772 (1975). In that case, the Court upheld a statutory scheme against a due process challenge, noting:

> . . . appellees *are completely free to present evidence that they meet the specified require-*

> *ments;* failing in this effort, their only constitutional claim is that the test they cannot meet is *not so rationally related* to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

Id. at 772 (emphasis added).

Assuming that this due process analysis were applicable to a judicial decision, it is clear that the ruling of the court of appeals in this case satisfies the *Weinberger* test. As discussed above, Shields had every opportunity to present evidence that he had disclosed the alleged refusal to deal to Production Finishing. Alternatively, Shields has failed even to argue that the disclosure requirement is not rationally related to a legitimate judicial objective. There can be no serious argument that requiring fiduciaries to make a full and fair disclosure of a purported refusal to deal before taking the corporate opportunity for their personal benefit is rationally related to the legitimate objective of requiring fiduciaries to live up to their obligations of loyalty and fidelity. The more than rational basis for the rule has been articulated as follows:

> For the reason that the firmness of a refusal to deal cannot be adequately tested by the corporate executive alone, it has not been favored as a defense unless the refusal has first been disclosed to the corporation. Without full disclosure, it is too difficult to verify the unwillingness to deal and too easy for the executive to induce the unwillingness.
>
> * * *
>
> The difficulty with the judge's reasoning is that the unalterability of Jackson's resolve can by

> no means be certain so long as Porter [the corporate officer], by keeping Jackson's position and his reasons for it a secret, never afforded ERCO [the principal] a chance to test it.

Energy Resources Corp. v. Porter, 14 Mass. App. 296, 438 N.E. 391, 393 (1982). It is, at a minimum, rational for the courts to take the position that such a speculative conclusion should not be allowed in the absence of disclosure which would provide a contemporaneous chance to test the purported unwillingness to deal.

For these reasons, without regard to whether or not the doctrine of "irrebuttable presumptions" retains validity today[2], it is clear that the present case could not under any reasonable interpretation run afoul of that doctrine.

C. This Court Lacks Jurisdiction to Decide a Purported Constitutional Issue Not Passed Upon by the State Courts Below.

At no time before the trial court, the Michigan Court of Appeals, or in his application for leave to appeal to the Michigan Supreme Court did Shields argue that any constitutional right was implicated by any of the issues raised in this case. Rather, in his reply brief, just before

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[2] The observations of Chief Justice Rehnquist in his dissent in *Toll v. Moreno*, 458 U.S. 28 (1982), reflect the commentators' skepticism regarding the viability of this line of due process analysis:

> There is legitimate doubt whether at this late date anything remains of *Vlandis v. Kline* but its lifeless words on the pages of these Reports. Such doubts, however, need not be resolved in this case.

Id. at 48.

the March 22, 1988 ruling of the Michigan Supreme Court denying his application for leave to appeal, Shields apparently recognized that the Court's decision was about to become final absent a petition for certiorari to the United States Supreme Court. However, no federal or constitutional question had been raised at any point in this proceeding by any party. Therefore, apparently grasping for straws, Shields included an entirely new argument in his reply brief before the Michigan Supreme Court. At that point, seven years into the case, Shields first proffered the argument that the requirement of disclosure was a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.[3]

Shields' application for leave to appeal and his motion for reconsideration were each denied by the Michigan Supreme Court without opinion.

Respondent now claims that this Court has jurisdiction over the pending matter pursuant to 28 U.S.C. §1257. In relevant part, that statute provides:

> Final judgments or decrees rendered by the highest Court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

---

[3] In his petition for writ of certiorari, Shields has changed his argument and now, for the first time, more appropriately relies on the Fourteenth Amendment.

The scope of jurisdiction of the United States Supreme Court under this provision has been clearly defined in several decisions. Perhaps most pertinent to the Court's ruling here is *Webb v. Webb,* 451 U.S. 196 (1981). In that case, the Court had granted certiorari, but then was forced to decline jurisdiction upon examining the record and learning that the asserted federal question had not been passed upon by the state supreme court. In dismissing the case, the Court observed:

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); [other citations omitted].

Id, 451 U.S. at 495-496. The Court emphasized that there are powerful policy considerations underlying the statutory requirements and Supreme Court Rule 21.1(h) requiring that federal challenges be presented first to the state courts.

> These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

451 U.S. at 499.

Not only principles of comity but also very practical reasons, such as providing state courts with the opportunity to interpret their rules to avoid federal constitutional challenges or to clarify independent and adequate state grounds for determining the issue, provide a sound basis for strict enforcement of this rule. 451 U.S. at 500.

In *Webb,* the petitioner had raised the concept of "full faith and credit" at several points in the proceedings below, including the trial court. However, her failure to cite the United States Constitution, as opposed to making references to state law was fatal to her petition for certiorari.

Similarly, in the present case, Shields failed to identify any of his arguments as raising a federal question or a constitutional issue until after all of the issues in the case had been determined by the court of appeals and leave to appeal had been briefed before the Michigan Supreme Court. For these reasons, it is clear that this Court does not have jurisdiction over the purported constitutional issue.

Moreover, even if jurisdiction were present, none of the criteria for granting certiorari are present in this case. Supreme Court Rule 17.1 sets forth considerations governing review on certiorari. If petitioner could set aside the determinative jurisdictional facts that no question of federal law was decided by any court in this case, and that no question of federal law is presented by this case, certiorari should still be denied because the question raised is neither unsettled nor an important federal question which should be settled by this Court. See Supreme Court Rule 17.1(c). Thus, Shields has failed to make any showing that this case is appropriate for a grant of certiorari.

Conclusion

For these reasons, the petition for a writ of certiorari to the Supreme Court of Michigan should be denied.

DATED: Chicago, Illinois, October 21, 1988

Respectively submitted,

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APPENDIX

APPENDIX

Aluminum Coil Incorporated
Alumark Corporation
Alumark Transport Corporation
American Powdered Metals Company
AmeriMark Building Products, Inc.
Boulevard Travel Center, Inc.
Ceramic Engine Technology Corporation
Clark Bros. Metal Fabricators, Inc.
Clark Transport, Inc.
Eastern Realty Services, Inc.
Hastings Aluminum Corp.
Hastings Building Products, Inc.
Hastings Equipment Leasing Corp.
Homelife Building Products
Innovative Insurance Associates, Inc.
Laboratories Dominel, S.A.
Micro Fusion, Inc.
MidAmerica Extrusions Corporation
Plasmafusion, Inc.
Plasmafusion International, Inc.
Republic Building Products, Inc.
Republic Foil, Inc.
Starmark Corporation
Technology International, Ltd.
The Worldmark Group, Inc.
Transmark Leasing Corp.
Transmark Transportation, Inc.
Wolverine Coil Coating, Inc.
Wolverine Companies, Ltd.

World Equipment Leasing Corp.
World Realty Services, Inc.
Worldmark Asia, Ltd.
Wordmark Corporation
Worldmark Insurance Services, Inc.
Worldmark International Corporation
Worldmark Leasing Corporation
Worldmark Marine, Inc.
Worldmark Materials Corporation
Worldmark Materials Asia, Ltd.
Worldmark Publishing Corp.
Worldmark Securities, Inc.
WorldSource Coil Coating, Inc.
WorldSource Industries, Inc.